

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0366
SALES/USE TAX
For The Tax Periods: 1995, 1996**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax – Rental of Tangible Personal Property

Authority: IC 6-2.5-4-10, IC 6-2.5-3-2, IC 6-2.5-3-4.

The Taxpayer protests the Department's assessment of use tax for rental of a Logic Trunk Radio (LTR).

II. Use Tax – Rental of Tangible Personal Property

Authority: IC 6-2.5-3-2, 45 IAC 2.2-3-8.

The Taxpayer protests the Department's assessment of use tax on stone laid at tower site.

III. Use Tax – Office Supplies

Authority: IC 6-2.5-3-2, IC 6-8.1-5-1, IC 6-8.1-5-4.

The Taxpayer protests the Department's assessment of use tax on office supplies.

STATEMENT OF FACTS

Taxpayer was audited for the calendar years of 1995 and 1996 for sales and use tax. Taxpayer is primarily a retailer and provides service for two-way radio communications equipment. Taxpayer sells and leases two-way radio equipment and related accessories. Taxpayer also became a registered Indiana motor vehicle dealer in 1994. Taxpayer protests the assessment of use tax on a Logic Trunk Radio, capital purchases and office supplies. More facts supplied as necessary.

I. Use Tax: Rental of Tangible Personal Property

DISCUSSION

Audit assessed use tax on the lease of tangible personal property. Taxpayer leases a Logic Trunk Radio (LTR) from a related company and the related company failed to collect sales tax. IC 6-2.5-4-10 states that: “[a] person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property.” Also, “[a]n excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.” IC 6-2.5-3-2. The transaction is exempt from use tax if the property was acquired in a retail transaction in Indiana and the state gross retail tax was paid on the transaction. IC 6-2.5-3-4.

Here, Taxpayer argues that they are not renting the equipment. They state that they are making periodic commission payments based on their usage of the equipment (*i.e.* airwaves). A commission is defined as “[t]he recompense, compensation or reward of an agent, salesman, executor, trustee, receiver, factor, broker, or bailee, when the same is calculated as a percentage on the amount of transactions or on the profit to the principal. A fee paid to an agent or employee for transacting a piece of business or performing a service.” Black’s Law Dictionary 1136 (6th ed. 1997). Taxpayer has not demonstrated that the transaction involves any type of service for the owner. Rather, Taxpayer uses the equipment in furtherance of its own business operations. Taxpayer is unable to transmit through the airwaves without the tangible personal property (LTR). Consequently, Taxpayer’s protest is denied.

FINDING

The Taxpayer’s protest is denied.

II. Use Tax: Capital Asset Purchases

Taxpayer protests the assessment of use tax on stone that was laid at a tower site as well as concrete and parts used for the tower. The auditor assessed the stone after determining that no sales or use tax was paid on the purchase. “[U]se tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.” IC 6-2.5-3-2. Also, 45 IAC 2.2-3-8 states:

- (a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owning and unpaid state gross retail tax or use tax with respect to such tangible personal property.

Consequently, the items in question are subject to use tax.

FINDING

The Taxpayer's protest is denied.

III. Use Tax: Office Supplies

DISCUSSION

Taxpayer was assessed use tax on the purchases of office supplies, books, publications, subscription, computer diskettes and software, and general repair items pursuant to IC 6-2.5-3-2.

Taxpayer argues that the items were purchases locally and sales tax was paid. However, the audit report states that these items were purchased from outside Indiana and subsequently consumed and used in Indiana. Pursuant to IC 6-8.1-5-1(b): "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposes assessment is wrong rests with the person against whom the proposes assessment is made."

Taxpayer asserts that the records pertaining the purchases were destroyed in a fire at one of Taxpayer's other businesses in November 1999. A subsequent audit of Taxpayer verified the fire.

IC 6-8.1-5-4 states

- (a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Yet, Taxpayer's argument is without merit for the years in question because the Audit Progress Report notes that the audit was completed on April 7, 1999, before the fire.

FINDING

Taxpayer's protest is denied.